the case at hand, Sprint is one CLEC reselling its services to a second CLEC – MCC. (Tr. 27.)

In over 30 markets across the country, Sprint acts as a retail service provider by purchasing switching and interconnection from another CLEC and purchasing loops from the ILEC to provide service. (Tr. 31.) Sprint says this is comparable to the proposed Sprint/MCC arrangement in Iowa, with MCC (as the retail service provider) purchasing switching and interconnection from Sprint. (Id.)

In other markets, Sprint has purchased unbundled network elements from another CLEC which has purchased them from the ILEC. (Id.) Again, Sprint says this is comparable to the Sprint/MCC arrangement, except in those markets Sprint is the retail service provider where in Iowa MCC will be the retail service provider.

Sprint has entered into arrangements with other cable companies in 18 states including MCC, Wide Open West, Time Warner Cable, Wave Broadband, and Blue Ridge Communications. (Tr. 38.) Sprint will offer its interconnection services to all entities similarly situated to MCC with last-mile facilities to the cable companies. Through these arrangements Sprint provides services to all within the class similar to MCC to allow those services effectively to be offered to the public. However, the network configurations will not be identical for each entity that intends to use Sprint's services, because different carriers will have different requirements. (Tr. 39.)

On October 17, 2005, the day before the hearing in this matter, Sprint filed with the Board a proposed tariff for a wholesale service offering.[4] (Tr. 13.) The proposed tariff is offered only to competitive service providers that are similarly situated to cable companies. (Tr. 57-58.) The proposed tariff reflects only a portion of the services reflected in the contract between Sprint and MCC. (Tr. 59-60.) The contracts Sprint has entered into with cable companies to date reflect "a lot of material differences in the business relationship that Sprint has with the cable companies or any other similarly situated company... ." (Tr. 61-62.) As a result, the pricing is different in each of these contracts. (Tr. 64.)

B. Sprint's argument.

Pursuant to § 251(a) of the Act, a party must be a "telecommunications carrier" to be entitled to interconnection. Sprint's proposed services fit the definition of "telecommunications carrier" and "telecommunications services" within the definitions of sections 153(44) and 153(47). State commissions in Illinois and New York have affirmed Sprint on this point and the Ohio Commission has affirmed MCI on this point. Since Sprint's switches will terminate MCC traffic to the public switched telephone

[4] The RLECs objected to consideration of the proposed tariff as a part of this docket, based on the lack of time available to review the proposed tariff. (Tr. 14.) The Board noted the objection and reserved the option of scheduling additional hearing time for cross-examination concerning the proposed tariff, if necessary. (Tr. 15.) The Board then issued an order giving the RLECs until October 24, 2005, to file in this docket a response to Sprint's proposed tariff, addressing the possible effect of the tariff on the issue currently before the Board: whether Sprint's proposed activities would make it a "telecommunications carrier' for purposes of 47 U.S.C. §§ 251 and 252. No response was filed.

network (PSTN), this clearly falls within the definition of "telephone exchange service" in § 153(47).

The RLECs contend that entering into an interconnection agreement with Sprint would somehow interfere with their § 251(b) rights with respect to MCC. Sprint asserts that this is a red-herring argument that should be disregarded. The presence of an interconnection agreement with Sprint would in no way preclude the RLECs from seeking a separate agreement with MCC. (Tr. 50.)

The RLECs also contend that even if they are required to interconnect, Sprint would not be entitled to local number portability or dialing parity pursuant to § 251(b). On this claim, Sprint argues, the RLECs are wrong on two counts. First, Sprint meets the statutory definitions of both "telephone exchange service" and "exchange access" making Sprint a "local exchange carrier" pursuant to § 153(26) and is explicitly eligible for rights under § 251(b). Second, even if Sprint were not a "local exchange carrier" within the meaning of the Act, a plain reading of § 251(a) makes it clear that the obligation to interconnect directly or indirectly extends to all telecommunications carriers – not just local exchange carriers. The Tenth Circuit Court of Appeals in Atlas Telephone upheld this principle.[5] (Sprint Initial Brief pp. 15-16.)

C. RLEC evidence

In October 2004, each of the RLECs received a letter from Sprint requesting interconnection pursuant to §§ 251 and 252 of the Act. (Tr. 179.) The letter from

[5] Atlas Telephone Co., et al. v. Oklahoma Corp. Comm'n, et al., 400 F.3d 1256 (10th Cir. 2005).

Sprint did not mention Sprint's intent to use the interconnection agreement to provide services to other local exchange carriers or to MCC. (Id.) After some communication, the RLECs determined that Sprint was not requesting interconnection as a CLEC, but was seeking an agreement to enable it to provide certain business services to MCC. Iowa Telecom, and perhaps other RLECs, offered to execute an interconnection agreement either with MCC as a CLEC or with Sprint as MCC's agent. (Tr. 179.) This offer was rejected. (Id.) There have been no requests from MCC for interconnection. (Id.)

The RLECs believe MCC is a local exchange carrier, while Sprint is merely one of many suppliers of resources needed by MCC to provide local exchange service. (Tr. 180.) This is confirmed in Sprint's prehearing brief where it states "MCC will outsource much of the network functionality, operations and back-office systems to Sprint... Service will be provided in MCC's name and MCC will be responsible for its local network, marketing and sales, end-user billing, customer service and installation." (Sprint Prehearing Brief p. 3.)

Many ILECs and CLECs procure operator services, directory assistance, and directory publishing services from other vendors rather than producing these capabilities themselves. (Tr. 182.) None of these vendors are considered local exchange carriers, even though the services they provide may be "vital and necessary components of a total service package." (Id.) Sprint is trying to convince

the Board to significantly expand its definition of carrier activities to encompass vendor and contractor services.

D. RLEC argument.

Affording Sprint the legal status for negotiation and arbitration pursuant to §§ 251 and 252 would produce competitive distortions that would affect the rights of both ILECs and CLECs. Further, even if the Board were to find that Sprint is entitled to interconnection pursuant to § 251(a), Sprint would not satisfy the requirements of § 251(b). This is because Sprint is not providing "telephone exchange service" or "exchange access" pursuant to § 153. Thus, without meeting the requirements of 251(b), Sprint would not be entitled to local number portability or dialing parity. (RLEC Initial Brief pp. 13-19.)

BOARD ANALYSIS

At this stage of this proceeding, the Board must answer one question: Is Sprint proposing to operate as a common carrier in the service territories of the 27 RLECs? If the answer is yes, then Sprint will be a telecommunications service provider and is entitled to invoke the negotiation and arbitration provisions of 47 USC § 252 and seek interconnection pursuant to § 251. The Board will then re-commence the arbitration docket as soon as general jurisdiction of the matter is restored to the

agency. This is the conclusion that the Illinois, New York, and Ohio commissions have reached.[6]

If the answer is no, then Sprint does not have the right to negotiation and arbitration pursuant to § 252.[7] The Board will not change its May 26, 2005, order, and the matter will either return to court or MCC will send a bona fide request for negotiations to the RLECs.

In order to invoke the negotiation and arbitration procedures of § 252 and, therefore, the interconnection obligations in § 251(a), Sprint must show that it is a "telecommunications carrier" pursuant to § 153(44) of the Act. The relevant part of § 153(44) defines "telecommunications carrier" as "any provider of telecommunications services... ." Section 153(46), in turn, defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used."

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[6] Sprint Communications Company L.P., Petition For Consolidated Arbitration with Certain Illinois Incumbent Local Exchange Carriers, "Proposed Arbitration Decision," Docket No. 05-0402 (Ill. Commerce Comm'n, October 26, 2005); Petition Of Sprint Communications Company L.P. For Arbitration To Establish An Intercarrier Agreement With Independent Companies, "Order Resolving Arbitration Issues," Case No. 05-C-0170 (NYPSC May 18, 2005); Application And Petition In Accordance With Section II.A.2.b Of The Local Service Guidelines Filed By The Champion Telephone Co., et al., Case No. 04-1494-TP-UNC, "Order On Rehearing" (Ohio PUC January 26, 2005).

[7] This is the decision the Nebraska commission recently reached in similar circumstances, Sprint Communications Co. LP, Petition For Arbitration Between Sprint And Southeast Nebraska Telephone Co., Application No. C-3429 (Neb. PSC September 13, 2005).

This statutory language has been the subject of interpretation by the FCC and the courts,[8] which have held that in order to be a "telecommunications carrier," an entity must be a "common carrier." The leading case is Virgin Islands Telephone v. FCC, 198 F.3d 921 (D.C. Cir. 1999), in which the court affirmed an FCC determination that an AT&T affiliate was not a "telecommunications carrier" under the act because it would not function as a "common carrier."

Common carrier status is determined by a two-pronged test: First, whether the carrier holds itself out to serve all potential users indiscriminately and, second, whether the carrier allows each customer to transmit information of the customer's own design and choosing. United States Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002), citing National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976). The key determinant is whether an entity is holding itself out to serve indiscriminately. Virgin Islands Tel., 198 F.3d at 927, citing NARUC I, 525 F.2d at 642. "But a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so." NARUC I, 525 F.2d at 641, footnotes omitted.

[8] Because as state commission assumes federal authority when it acts pursuant to §252 of the Act, the Board is required to employ these standards when arbitrating an interconnection agreement. Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc., 77 F.Supp.2d 492, 500 (D. DE 1999).

Applying these standards to the record before it, the Board finds that Sprint has carried its burden of showing that it is proposing to operate as a common carrier in the RLEC service territories. It is clear that Sprint is willing to provide wholesale services to any last-mile retail service provider that wants Sprint's services in Iowa.

Thus, the Board finds that Sprint is a common carrier and therefore a telecommunications carrier under the Act. While Sprint does not offer its services directly to the public, it does indiscriminately offer its services to a class of users so as to be effectively available to the public, that class consisting of entities capable of offering their own last-mile facilities. Thus, Sprint meets the first prong of the NARUC I test, as clarified by USTA. (Sprint also meets the second prong of the NARUC I test by not altering the content of the communications it will carry; there was no dispute concerning this part of the test.)

The RLECs point out that each contract Sprint has with a last-mile provider has a different price and all of those prices are considered by Sprint to be confidential. The RLECs argue, in essence, that Sprint cannot be holding itself out to serve the public indiscriminately under these conditions. The Board disagrees for three reasons.

First, it should be no surprise that each contract has different provisions, including different prices. The fact is that the business of selling these wholesale services has not evolved into a standardized offering. Sprint is offering numerous different wholesale services and different last-mile providers will purchase different

pieces to create their own distinct bundles. When each contract is for a different set of services, it should be no surprise that each contract has different pricing.

Second, it is unsurprising that the parties to these contracts consider the specific terms and conditions, including the pricing, to be confidential. One of the points of the Act was to create and foster competition in the local exchange marketplace. Competitors typically do not want their competition to know their costs and consider cost information to be a trade secret. It is reasonable to expect that as competition increases, the willingness of the competitors to reveal their cost data will decrease.

Third, because each contract involves a unique set of circumstances and a unique bundle of services, cost comparisons between the contracts would not be particularly meaningful. To know that a bundle of services sold to one last-mile provider costs one price, and a bundle sold to another last-mile provider costs another price would tell a potential buyer with different needs little or nothing about the cost of the bundle Sprint could provide to that buyer. Again, this market has not developed to produce standardized, cookie-cutter offerings.[9]

Finally, there appears to be an underlying concern in the RLEC position that Sprint and MCC are insisting upon this particular business model in order to achieve some as-yet-unspecified advantage. For example, the RLECs argued that if they are

[9] In this context, it is important to note that the Board is not relaying on Sprint's day-before-hearing tariff filing in support of this ruling. While Sprint may have identified one small part of the overall bundle of services that can be standardized and filed as part of a tariff, it is not a complete bundle of services and is irrelevant to this analysis.

required to enter into an interconnection agreement with Sprint, rather than MCC, the RLECs might be denied some rights under § 251. During the course of this proceeding, Sprint was able to respond to each of the concerns raised by the RLECs, but the RLECs may still be concerned. (See, e.g., Tr. 49, 50, 165.) The Board will not reject Sprint's preferred business model on the basis of unspecified concerns, but the Board emphasizes that if any anti-competitive problems develop as a result of this approach, the RLECs may file an appropriate complaint with the Board.

Having reconsidered its May 26, 2005, order on the basis of the additional evidence presented to the Board, the Board concludes that Sprint's proposed business plan with MCC in the RLEC exchanges is sufficiently affected with the public interest to establish that Sprint will be operating as a common carrier. This means, in turn, that Sprint will be a telecommunications carrier in these exchanges and is therefore entitled to invoke the arbitration provisions of 47 U.S.C. § 252. As a result, the Board will reinstate the pending arbitration proceedings at the point at which they were terminated, just as soon as general jurisdiction of this matter has been restored to the Board by Court order, by dismissal of the Court action, or by other appropriate means. Picking up the schedule where it left off, the parties and the Board will have only 79 days to complete this arbitration (in the absence of a joint waiver or other agreement by the parties to extend the arbitration deadline). This is an unusually tight time frame, made even more so by the fact that the parties have

not negotiated to any significant degree. The parties should expect that the procedural schedule, once set, will be firm.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The Board hereby reconsiders and rescinds its May 26, 2005, "Order Granting Motions To Dismiss" in this docket, for the reasons given in the body of this order.

2. General Counsel is directed to file a copy of this order in the United States District Court proceeding relating to the Board's May 26, 2005, order.

3. Upon the return of jurisdiction over this matter from the Court, this docket will be resumed as of the point at which it was interrupted.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 28th day of November, 2005.

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2005-188-C - ORDER NO. 2006-2

JANUARY 11, 2006

IN RE:	Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996.	) ORDER RULING) ON ARBITRATION))))

I. PROCEDURAL BACKGROUND

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Petition for Arbitration ("Petition") filed by MCImetro Access Transmission Services, LLC ("MCI") for arbitration of certain issues pertaining to the terms and conditions of interconnection agreements between MCI and Horry Telephone Cooperative, Inc. ("Horry").

Pursuant to Section 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"),[1] the negotiation of the Interconnection Agreement commenced on or about January 10, 2005. MCI filed its Petition, pursuant to the provisions of Section 252 of the Act, on June 20, 2005. MCI's Petition sets forth ten (10) unresolved issues between the Parties. Horry filed a response ("Response") on July 15, 2005, responding to the same issues raised in the Petition. Horry did not enumerate

[1] 47 U.S.C. §§ 252(b)(1) and (2).

additional issues in their Response.

The Parties filed a Joint Motion Regarding Procedure on July 27, 2005, requesting certain changes in the pre- and post-hearing procedures. Joseph Melchers, Esquire, was appointed by the Commission to serve as a Hearing Officer in the matter. Mr. Melchers issued a Hearing Officer Directive on August 11, 2005, extending the timeframe in which the Commission must resolve the unresolved issues remaining in this arbitration proceeding until January 11, 2006, modifying the briefing schedule, and making certain modifications in the procedure for conduct of the hearing.

A hearing on this Arbitration was held beginning on October 4, 2005, with the Honorable Randy Mitchell, Chairman, presiding. At the hearing, MCI was represented by Darra W. Cothran and Kennard B. Woods. MCI presented the Direct and Rebuttal Testimony of Greg Darnell.

Horry was represented at the hearing by M. John Bowen, Jr., and Margaret M. Fox. Horry presented the Direct and Surrebuttal Testimony of Douglas Duncan Meredith and of Valerie Wimer.

The Office of Regulatory Staff ("ORS") was represented at the hearing by Shannon B. Hudson. ORS did not present a witness.

In their pleadings, the Parties identified ten (10) unresolved issues that required the Commission's attention. The ten issues may be grouped conceptually into four topics for discussion purposes as follows: (1) Direct vs. Indirect Service (Issues 2, 4(a), 7 and 9); (2) ISP-Bound Traffic and Virtual NXX (Issues 3, 4(b) and 5); (3) Reciprocal Compensation Rate (Issue 10); and (4) Calling Party Identification (Calling Party

Number ("CPN") and Jurisdictional Indicator Parameter ("JIP")) (Issues 1, 6 and 8). These issues are the same ten issues that were previously addressed by the Commission in the arbitration involving MCI and four other rural incumbent local exchange carriers in South Carolina in Docket No. 2005-67-C.

II. LEGAL STANDARDS AND PROCESSES FOR ARBITRATION

After a telecommunications carrier has made a request for interconnection with another telecommunications carrier, and negotiations have continued for a specified period, the Act allows either party to petition a state commission for arbitration of unresolved issues. 47 U.S.C. § 252(b)(1). The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved, and must include all relevant documentation, including the position of each of the parties with respect to the unresolved issues. 47 U.S.C. §§ 252(b)(2)(A). A non-petitioning party to a negotiation under this section may respond to the other party's petition and may provide such additional information as it wishes within twenty-five (25) days after the state commission receives the petition. 47 U.S.C. § 252(b)(3). The Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and the response. 47 U.S.C. § 252(b)(4).

Through the arbitration process, the Commission must now resolve the remaining disputed issues in a manner that ensures the requirements of Sections 251 and 252 of the Act are met. Once the Commission provides guidance on the unresolved issues, the parties will incorporate those resolutions into a final agreement that will then be submitted to the Commission for its final approval. 47 U.S.C. § 252(e).

The purpose of this arbitration proceeding is the resolution by the Commission of the remaining disputed issues set forth in the Petition and Response. 47 U.S.C. § 252(b)(4)(c). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission ("FCC") regulations pursuant to Section 252; and shall provide a schedule for implementation of the terms and conditions by the parties to the Agreement. 47 U.S.C. § 252(c).

III. DISCUSSION OF ISSUES

As noted above, ten issues remain for the Commission to resolve, and those issues can be grouped as follows: (1) Direct vs. Indirect Service (Issues 2, 4(a), 7 and 9); (2) ISP-Bound Traffic and Virtual NXX (Issues 3, 4(b) and 5); (3) Reciprocal Compensation Rate (Issue 10); and (4) Calling Party Identification (CPN and JIP) (Issues 1, 6 and 8).

In this section, we will address and resolve the open issues that have not been settled by negotiation and, therefore, must be resolved by the Commission pursuant to Section 252(b)(4) of the Act. The issues which the Commission must resolve are set forth in this section, along with a discussion of each issue that sets forth the Commission's findings and conclusions.

TOPIC 1: DIRECT vs. INDIRECT SERVICE (Issues 2, 4(a), 7 and 9)

We will discuss Issues 2, 4(a) and 7 together, because the argument is the same, and will address the separate but related Issue 9 separately.

ISSUE 2: Should End User Customer be defined as only the End User directly served by the Parties to the contract?

MCI's Position:

No. End User Customers may be directly or indirectly served. The Act expressly permits either direct or indirect service.

Horry's Position:

Yes. This agreement is limited in scope to the intraLATA traffic exchanged between customers of one party and the customers of the other party. Other carriers that provide local exchange services to customers and wish to exchange traffic with Horry must establish their own interconnection or traffic exchange agreements with Horry.

ISSUE 4(a): Should MCI have to provide service only directly to end users?

MCI's Position:

No. End User Customers may also be indirectly served by the Parties. The same "directly or indirectly" language is used in section 2.22 of Horry's model contract for defining interexchange customers.

Horry's Position:

For purposes of this agreement, yes. The traffic governed by this agreement is for telecommunications service provided by either Party to end-user customers.

ISSUE 7: Does this contract need this limit of "directly provided" when other provisions discuss transit traffic, and the issue of providing service directly to end users is also debated elsewhere?

MCI's Position:

No. This language is unnecessary and confusing in light of other provisions of the contract.

Horry's Position:

Yes. As discussed in Issues 2 and 4(a), third party traffic is not part of this agreement between Horry and MCI.

Discussion:

The issue here is whether Horry may appropriately limit the scope of its Agreement with MCI so that it applies only between Horry and MCI – and relates to the exchange of their respective end user customers' traffic. We believe it is appropriate to limit the Agreement so that it applies only to Horry and MCI and to the traffic generated by the Parties' direct end user customers on their respective networks.

Horry is required to provide interconnection and to exchange traffic only with other telecommunications carriers.[2] This Agreement is properly limited in scope to the intraLATA traffic exchanged between customers directly served by one party and the customers directly served by the other party, and the definition of "end user" is properly limited to retail business or residential end-user subscribers (*i.e.*, it does not include other carriers).

The carrier directly serving the end user customer is the only carrier entitled to request interconnection for the exchange of traffic under Section 251(b) of the Act. Other carriers that provide local exchange service and wish to exchange traffic with Horry must establish their own interconnection or traffic exchange agreements with Horry. While it may be appropriate under certain circumstances for a telecommunications carrier to interconnect its facilities indirectly with Horry's network under Section 251(a)

[2] See Section 251 of the Federal Telecommunications Act of 1996 (the "Act").

of the Act, this provision does not allow *non-telecommunications* service providers to interconnect (either directly or indirectly), nor does it relieve an interconnecting carrier of the obligation to establish its own arrangements for exchanging traffic and establishing an appropriate compensation agreement with the telecommunications carrier to which it is indirectly connected.

MCI's argument that Section 251(a) of the Act requires Horry to transport and terminate third-party traffic is erroneous. 47 U.S.C. § 251(a) requires that:

> Each telecommunications carrier has the duty---
>
> (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.

The duty to interconnect under Section 251(a) of the Act relates to "the physical linking of two networks for the mutual exchange of traffic."[3] It does *not* require a carrier to transport and terminate another carrier's traffic.[4] Transport and termination obligations extend from Section 251(b) of the Act and apply only directly between local exchange carriers.[5] Nothing in the Act supports MCI's contention that indirect *service* to *end user customers* was contemplated, much less permitted, by the Act. In fact, the FCC's rules

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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997) ("*Local Competition Order*") at ¶ 11.

[4] *See Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corporation*, File No. E-97-003, FCC 01-84, Memorandum Opinion and Order (rel. Mar. 13, 2001), at ¶ 23 ("In the *Local Competition Order*, we specifically drew a distinction between 'interconnection' and 'transport and termination,' and concluded that the term 'interconnection,' as used in section 251(c)(2), does not include the duty to transport and terminate traffic.").

[5] *See* Section 251(b)(5); *Local Competition Order*, CC Docket 96-98, FCC 96-325 at ¶ 1034.

implementing interconnection uniformly address interconnection as a bilateral agreement between two carriers, each serving end user customers within the same local calling area. Section 251(b) describes duties for each "local exchange carrier" with respect to other "local exchange carriers." The FCC's *Local Competition Order* discusses the exchange of traffic for local interconnection purposes in which two carriers collaborate "to complete a local call."[6]

Interconnection under Section 251(a) is available only to telecommunications carriers.[7] Likewise, the obligations imposed by Section 251(b), including the duty to transport and terminate traffic, relate to parallel obligations between two competing telecommunications carriers serving within a common local calling area. Whether Voice over Internet Protocol ("VoIP") will be classified as a telecommunications service or information service is currently an open question before the FCC.[8] Unless and until the FCC does classify VoIP as a telecommunications service, VoIP providers do not have rights or obligations under Section 251. Thus, where MCI intends to act as an intermediary for a facilities-based VoIP service provider (e.g. TimeWarner), the VoIP provider would most likely argue that it is currently not required (and may never be required) to provide dialing parity or local number portability and, therefore, the duties of

[6] *See Local Competition Order*, CC Docket 96-98, FCC 96-325 at ¶ 1034.
[7] See Section 251(a)(1) of the Act ("Each telecommunications carrier has the duty . . . to interconnect . . . with the facilities and equipment *of other telecommunications carriers* . . .") (emphasis added).
[8] See Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 (2004); *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, Memorandum Opinion and Order (rel. Nov. 12, 2004) , ("*Vonage Order*"), fn 46 ("We do not determine the stature classification of Digital Voice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future.").

Horry and the VoIP service provider would not be parallel. This type of a non-parallel relationship was not contemplated or provided for under the Act.

Furthermore, the FCC's regulation on reciprocal compensation specifically refers to the direct relationship of the carrier to the end user customers in the exchange of traffic.

> For purposes of this subpart, a reciprocal compensation arrangement *between two carriers* is one in which *each of the two carriers* receives compensation *from the other carrier* for the transport and termination *on each carrier's network facilities* of *telecommunications traffic that originates on the network facilities of the other carrier.*[9]

Horry's position that only traffic directly generated by Horry and MCI end user customers should be exchanged pursuant to the Agreement is in keeping with the language and intent of the Act, as well as FCC rules and orders.

An interconnection agreement is between two parties. Neither third parties nor their traffic are part of an interconnection agreement between Horry and MCI. MCI attempted to point out that the proposed Agreement provides for transit traffic, which, according to MCI, is third party traffic. However, the issue of performing a transit function is separate and distinct from the issue of indirect traffic exchange of third parties' end-user customers. It is necessary for the agreement to have language regarding transit traffic because Horry has a tandem switch in its network and other carriers have NPA-NXXs with a homing arrangement to Horry's tandem. When MCI originates local traffic that terminates to a CLEC or another carrier that has an NPA-NXX with a homing

[9] 47 CFR § 51.701(e) (emphasis added).

arrangement to Horry's tandem in the LERG, a transit function is required. If MCI originates such traffic, the agreement states that MCI will pay the transit rate to Horry. The transit language does not place any obligations on third-party carriers. In addition, the language specifically states that payment of reciprocal compensation on such traffic is not part of this agreement but instead must be negotiated between MCI and the third party. Providing for transit in the Agreement is consistent with Horry's position that the carriers may have indirect "physical" interconnection facilities but must also have direct contractual arrangements for the transport and termination of traffic.

Applicable statutory and case law support Horry's position that MCI is not entitled to interconnection for the purpose of acting as an intermediary for a third party that will, in turn, provide services to end users. "Telecommunications carrier" is defined in the federal Act as a provider of telecommunications service.[10] "Telecommunications service" means "the offering of telecommunications for a fee *directly to the public*, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[11] Applying these definitions to the situation here, to the extent MCI seeks to provide service to Time Warner Cable Information Services, LLC ("TWCIS"), or indirectly to TWCIS' end user customers, such service does not meet the definition of "telecommunications service" under the Act and, therefore, MCI is not a "telecommunications carrier" with respect to those services. Thus, MCI is not entitled to seek interconnection with Horry with respect to the service MCI proposed to provide indirectly to TWCIS' end user customers.

[10] Section 153(44) of the Act.
[11] Section 153(46) of the Act.

This reasoning is consistent with the United States Court of Appeals for the District of Columbia Circuit's interpretation of the Act. The Court has held that, when a carrier is not offering service "directly to the public, or to such classes of users to be effectively available directly to the public," that carrier is not a telecommunications carrier providing telecommunications service under the Act with respect to that service.[12] Under this precedent, Horry has properly required that the Interconnection Agreement between Horry and MCI be limited to the exchange of traffic generated by the end user customers directly served by the parties.

MCI points to an Ohio Public Utilities Commission decision to support its argument.[13] However, the Ohio Commission failed to even mention the D.C. Circuit Court's *Virgin Islands* decision and the related FCC rulings.

It should be noted that MCI furnished a letter, dated December 21, 2005, which apprised this Commission of a recent decision issued by the Iowa Utilities Board ("the Iowa Board") in which the Iowa Board overturned its initial ruling and held that Sprint is a telecommunications carrier in the State of Iowa and is, therefore, entitled to seek interconnection with rural local exchange carriers to provide intermediary services to VoIP service providers seeking to exchange traffic with such carriers. Based upon the Iowa Board's reconsideration of its earlier order, MCI requests that this Commission adopt MCI's proposed contract language. Although this Commission cited the earlier ruling in our Order in Docket No. 2005-67-C, this was only one factor listed. When

[12] *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).
[13] *See* In re the Application and Petition in Accordance with Section II.A.2.b of the Local Service Guidelines filed by The Champaign Telephone Company, et al., Case No. 04-1494-TP-UNC, Finding and Order (issued January 26, 2005), Order on Rehearing (issued April 13, 2005).

examined as a whole, it is clear that our prior Order was based on Section 251 of the Telecommunications Act of 1996 and our interpretation as to its intent. Therefore, we believe that our prior Order was correct. Further, we do not believe that this reversal of a decision by another state is controlling in the present case. As noted herein, we believe that proper interpretation and reasoning and the examination of other precedent compels the conclusion reached herein. Other state decisions addressing similar issues are not controlling.[14]

It is important to note that, unlike rural local exchange carriers in some other states, Horry is not arguing that it should not be required to interconnect with MCI *at all*; it merely seeks to limit the Interconnection Agreement so that it applies to interconnection and the exchange of traffic between end user customers served directly by the parties, as intended by the Act.

MCI claims that Horry's proposal would prevent MCI from reselling its service. Horry asserts that this is not true, and that MCI's proposed arrangement with TWCIS does not constitute resale. In a resale situation, MCI would be the underlying facilities-based provider and the reseller would simply provide the complete service to the customer under a different name. MCI would still control the traffic, and would provide the switch and the loop to the customer premises. This is permitted under the Agreement.

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[14] *See, e.g.*, Order, *Cambridge Telephone Company, et. al., in Petitions for Declaratory Relief and/or Suspensions for Modification Relating to Certain Duties Under §§ 251(b) and (c) of the Federal Telecommunications Act*, No. 05-0259-0265,-0270, -0275,-0277, and –0298, Illinois Commerce Commission (July 13, 2005) (*Illinois Commerce Commission order*) (petition for reconsideration pending); Order Resolving Arbitration Issues, *Petition of Spring Communications, L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Independent Companies*, Case 05-C-0170, State of New York Public Service Commission (May 24, 2005).

What MCI seeks to do with TWCIS, on the other hand, is different because TWCIS itself is the facilities-based carrier[15] and MCI would have no control over the service or the end user.

At the hearing on this matter, MCI asserted that Horry, through an affiliate, provides VoIP service to customers and, therefore, Horry is providing what it says MCI should not be permitted to provide.[16] This is not true. As Horry's witness testified at the hearing, Horry does not provide VoIP service to customers, either itself or through an affiliated entity. [17] Second, while Horry may have a small percentage ownership in Spirit Telecom ("Spirit"), the evidence of record does not support MCI's claim that Spirit is an affiliate of Horry.[18]

MCI also appeared to be attempting to make an argument that Horry allows other carriers to connect indirectly with Horry through a BellSouth tandem switch.[19] However, the record shows to the contrary. When questioned as to whether there could be indirect interconnection between an independent like Horry and a CLEC, with a third-party carrier performing a transit function, Mr. Meredith testified that he believed that Horry has its own tandem switch and, therefore, "this particular scenario does not apply in the current case."[20]

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[15] *See, e.g.*, TWCIS S.C. Tariff No. 1, on file with the Commission, at p. 9 ("The Company's IP Voice Service is offered solely to residential customers who are subscribers to Time Warner Cable's cable modem and/or cable television service.")
[16] *See* TR. at p. 78, ll. 13-17.
[17] TR. at p. 163, l. 7.
[18] *See* S.C. Code Ann. § 35-2-201 (affiliate defined as "a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with a specified person."); *see also* TR. at 17-18 (counsel for Horry notes that, while Horry has a small ownership in Spirit, Horry does not control, is not controlled by, and is not under common control with Spirit).
[19] *See* TR. at p. 255, l. 7 through p. 256, l. 21.
[20] TR. at p. 256, ll. 13-21.